ROHANI SAID

v.

NORAINI OMAR & ANOR

HIGH COURT MALAYA, ALOR SETAR
BALIA YUSOF JC
[CIVIL APPEAL NO: 12-26-2000]
15 MAY 2002

DAMAGES: *Fatal accident - Loss of support - Quantum of damages awarded - Contingencies, other vicissitudes of life and accelerated payments - Whether trial judge omitted to consider - Whether 1/3 deduction ought to have been made from award of damages*

This was an appeal by the appellant against the decision of the Sessions judge in awarding RM52,800 as damages for loss of support awarded to the respondents for the death of the first respondent's husband. The appellant contended that the Sessions judge ought to have made a 1/3 deduction from the said sum for contingencies, other vicissitudes of life and accelerated payments.

Held:

[1] Based on the doctrine of *stare decisis*, this court was bound by the Court of Appeal's decision in *Takong Tabari* and the Supreme Court case of *Chan Chin Min* in relation to proviso (iv)(d) to s. 7(3) of the Civil Law Act 1956. As stated on *Chan Chin Min*'s case, the common law principle of making deductions for contingencies, other vicissitudes of life and accelerated payments had not been swept away by the said provision.

[2] The Sessions judge had erred when he failed to take into account contingencies, other vicissitudes of life and accelerated payment in awarding damages to the respondents when in fact he ought to and accordingly deduct 1/3 from the said amount.

[Appeal allowed.]

Case(s) referred to:

Chan Chin Min & Anor v. Lim Yok Eng [1994] 3 CLJ 687 ***(foll)***

Takong Tabari v. Government of Sarawak & Ors [1998] 4 CLJ 589 ***(foll)***

Teay Cheng Gow v. Elias Abdul Ghani (Mahkamah Tinggi Kuala Lumpur Bahagian Rayuan Dan Kuasa-kuasa Khas) (Rayuan Sivil No. R2-12-118-97) (unreported) ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 7(3)

For the appellant - P Ramanathan; M/s VP Nathan & Partners
For the respondent - S Visvanathan; M/s NM Tiong & Co

Reported by M Maheswaran

JUDGMENT

Balia Yusof JC:
This is an appeal against the decision of the learned Sessions Court Judge given in favour of the respondents/plaintiffs in a running down case. The learned Sessions Court Judge had on 7 June 2000 awarded to the respondents/plaintiffs a sum of RM52,800 as damages for loss of support in respect of the death of the first respondent's husband who died in a road accident in which the deceased was 20% liable. This figure was determined based on the finding of the learned Sessions Court Judge that the respondents has lost RM500 per month and based on a multiplier of 132 months the figure arrived at was RM66,000. Since the appellant/defendant was 80% liable for the accident, thus the figure of RM52,800. There are other damages awarded to the respondent which are not relevant for the purposes of the present appeal.

At the hearing of the appeal before me counsel for the appellant indicated to the court that the only issue to be advanced by the appellant is on the quantum of damages in respect of the claim under this heading of loss of support in the sum of RM52,800.

It is the contention of the appellant that the learned Sessions Court Judge has erred in law when he failed to make a deduction of 1/3 from the award for contingencies, other vicissitudes of life and accelerated payments. Counsel further submitted that based on the principle of *stare decisis*, the learned Sessions Court Judge is bound by the decision of the Court of Appeal in *Takong Tabari @ Takung Tabari v. Government of Sarawak & 2 Ors* [1998] 4 CLJ 589 which relied on the majority decision of the Supreme Court case of *Chan Chin Min & Anor v. Lim Yok Eng* [1994] 3 CLJ 687. It was further submitted that both these cases acknowledge that the amendment to the Civil Law Act in 1984 does not abrogate the common law principle that contingencies, other vicissitudes of life and accelerated payment must be taken into account in the determination of awards of this kind. Counsel for the respondent on the other hand argued that Takong Tabari was wrongly decided and further argued that *Chan Chin Meng & Anor v. Lim Yoke Eng (supra)* is a case where a parent claims in respect of an unmarried son who would sooner or later get married and that the loss of support will eventually decrease or

totally cease. A distinction ought to be drawn between a claim by a widow of a deceased husband for loss of support from that of a claim by a parent in respect of an unmarried child.

In the light of the submissions made by the parties to this appeal, the issue before me revolves solely on the question whether the learned Sessions Court Judge was right in not making the usual 1/3 deduction which necessarily calls for a consideration on the interpretation of proviso (iv)(d) to s. 7(3) of the Civil Law Act 1956 relating to claims of loss of support in respect of a deceased person which reads as follows:

> 7. Compensation to the family of a person for loss occasioned by his death
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> (1) ...
>
> (2) ...
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> (3) The damages which the party who shall be liable under subsection (1) to pay to the party for whom and for whose benefit the action is brought shall, subject to this section, be such as will compensate the party for whom and for whose benefit the action is brought for any loss of support suffered together with any reasonable expenses incurred as a result of the wrongful act, neglect or default of the party liable under subsection (1):
>
> Provided that:
>
> (i) ...
>
> (iv) In assessing the loss of earnings in respect of any period after the death of a person where such earnings provide for or contribute to the damages under this section the Court shall:
>
> (a) ...
>
> (d) take into account that in the case of a person who was of the age of thirty years and below at the time of his death, the number of years' purchase shall be 16; and in the case of any other person who was of the age range extending between thirty one years and fifty four years at the time of his death, the number of years' purchase shall be calculated by using the figure 55, minus the age of the person at the time of death and dividing the remainder by the figure 2.

Reverting to the case of *Takong Tabari @ Takung Tabari v. Government of Sarawak & 2 Ors (supra)* the issue that was before the Court of Appeal was whether the learned trial judge was right when he went on the deduct a sum of RM90,000 equivalent to 1/3 from the total sum, thereby leaving a balance

of RM180,000 for contingencies, other vicissitudes of life and accelerated payment. It was contended by the appellant that such a deduction is contrary to law. On that contention, the Court of Appeal reiterated:

> It is the widow's contention that such a deduction is contrary to law as by the introduction of proviso (d) to s. 7(30(iv) of the Act 67 on 1 October 1984, the discretion to deduct a sum for contingencies, other vicissitudes of life and accelerated payment at common law is now no longer available and with the replacement of that common law practice, there is already a built in deduction in the statutory formula itself and a further deduction as was done in this case was not proper. She contends that the estate is entitled to be paid the total sum or RM270,000 for her daim for loss of dependency. For this contention, she relies on the minority decision of the Supreme Court in the case of *Chan Chin Min & Anor v. Lim Yok Eng* [1994] 3 CLJ 687.

Unlike the appellant in *Takong Tabari*, the appellant in this appeal before me contends that the learned Sessions Court Judge was wrong in law in not making the 1/3 deduction in respect of the amount of damages awarded to the respondents for loss of support in the sum of RM52,800.

In disagreeing with the contention of the widow in *Takong Tabari*, Siti Norma JCA said:

> As a Court that is inferior to the Supreme Court, we are bound by the principle of *stare decisis* to accept the majority decision in *Chan*'s case. That majority judgment states that as a matter of interpretation, if Parliament had intended to depart from the general system of law, it would express its intention with irresistible clearness. Since it found such clearness missing in proviso (d), the common law practice of making deductions for contingencies, other vicissitudes of life and accelerated payment continues to be in force. Under such circumstances and in reliance of the majority decision in *Chan*'s case, we found that the learned trial judge made no error of law when he made the deduction and reduced the claim for loss of dependency to RM180,000.

The issue in the present appeal before me fits squarely with the issue in the case of *Takong Tabari*, and on the very same reason as stated by Her Lordship Siti Norma JCA, based on the doctrine of *stare decisis* I am bound by the decision of the Court of Appeal in *Takong Tabari* and the Supreme Court case of *Chan Chin Min & Anor v. Lim Yok Eng* on the interpretation of proviso (iv)(d) to s. 7(3) of the Civil Law Act 1956. To borrow the words of Peh Swee Chin SCJ in *Chan Chin Min*'s case, the common law principle or practice of making deductions for contingencies, other vicissitudes of life and accelerated payment has not been 'swept away or changed' by the amendment to the abovementioned provisions of the Civil Law Act 1956.

The binding effect of these two authorities was stated by KC Vohrah J in the unreported case of *Teay Cheng Gow v. Elias b. Abdul Ghani* (Mahkamah Tinggi Kuala Lumpur Bahagian Rayuan Dan Kuasa-Kuasa Khas) Rayuan Sivil No. R2-12-118-97) in a written judgment dated 14 September 2000 as follows:

> Notwithstanding a powerful and compelling dissenting judgment the view of the majority in *Chan Chin Ming* and the judgment of the Court of Appeal in *Takong Tabari* have, on the basis of *stare decisis*, to prevail and whatever interpretation accorded to s. 7(3)(iv)(d) must on the basis of consistency be applied to s. 28A(2)(d) and it would appear that the Judge of the Sessions Court erred in not taking into account contingencies, vicissitudes of life and accelerated payment which should be a usual 1/3 off from the plaintiff's loss of earnings for 14 years which was calculated at RM50,400. In the circumstances there shall be deducted from the amount of RM16,800 which leaves a sum of RM33,600 as damages for future earnings.

For the reasons stated above, I accordingly hold that the learned Sessions Court Judge was in error in failing to take into account contingencies, vicissitudes of life and accelerated payment in making the award which should be deducted in the usual form of 1/3 from the respondent's damages for loss of support which was calculated at RM52,800. From that amount there shall be a deduction of RM17,600 leaving a balance of RM35,200 as damages for loss of support, and this appeal is accordingly allowed. As to costs, the appellant has urged this court to order the parties to bear their own costs to which the respondent has no objection and accordingly I make an order in that term.